In Supreme Court of the United States.

October Term, 1877.—No. 265.

MARCOS RADICH, Plaintiff in Error,

vs.

Wm. J. HUTCHINS and C. G. WELLS,
Defendants in Error.

Writ of Error from the Eastern District of Texas,
AT GALVESTON.

W. P. BALLINGER,
For Defendants in Error

GALVESTON NEWS PRINT.

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STATEMENT OF THE CASE.

The plaintiff in error brought suit in the court below, claiming to be a subject of Russia, residing in Houston, Texas, alleging:

That in July, 1864, and before that time, he owned four hundred and fifty bales of cotton which was then at Houston, in Texas, in transit and designed to be sent to Matamoros, in Mexico, on wagons and carts. That then, and for a long

time previously, the defendant Hutchins, claiming and pretending to hold the office and appointment of Lieutenant Colonel in the army of the insurgent States called the Confederate States of America, and to be chief of the cotton office at the city of Houston, aforesaid, combining and confederating with the defendant Wells and divers other persons, without warrant of any law, by public notice had prohibited the exportation of cotton from the State of Texas, except upon written permits issued from his office, and that such written permits would not be issued except upon the condition that the person desiring to export or send such cotton beyond the limits of the State of Texas should sell or dispose of to defendants and their confederates, representing said pretended office, an amount of cotton equal to that for which the permit should issue, at a price nominal and arbitrary, fixed by said office, pretending that such purchase was for the benefit of the said so-called government of the Confederate States of America; or should sell and dispose of to said defendants and their confederates, representing said pretended office, for the use and benefit aforesaid, one moiety or half part of the cotton the trader should desire to export at the nominal and arbitrary price aforesaid; that is to say, that as petitioner desired to export and send 450 bales of cotton to Mexico, the permit to do so would be issued on his delivering to said defendants and their confederates an equal quantity of 450 bales of cotton; or a permit would be issued to him, as aforesaid, for the exportation of 225 bales of said cotton upon a surrender of 225 bales, being one moiety thereof, upon such pretended sale and purchase thereof for the nominal and arbitrary price aforesaid.

That being desirous to export and sell his cotton aforesaid, because of the risk incurred of its destruction, or other loss, during the internecine difficulties

between the Government of the United States and the southern section of the territory thereof, claiming to be and calling itself the Confederate States of America, and knowing that if he should attempt to pass and send his cotton beyond the frontier of the State of Texas into Mexico, that the armed force of the insurgents, provided and at hand to enforce and carry out the unjust, illegal and oppressive exactions of the said defendants and their confederates, would take, seize, capture and confiscate the same, so that petitioner would incur a total loss of property in this particular, acting under the compulsion and coercion of the force and circumstances aforesaid, he was compelled to submit for the time, and accordingly did submit, and did deliver, upon such compulsion, to said defendants and their confederates 225 bales of cotton of the value of $25,000, being one-half of the aforesaid 450 bales, at the nominal and arbitrary price fixed by them as aforesaid, as the consideration for a permit to export into Mexico 225 bales, the other moiety of said 450 bales of cotton; but upon the condition insisted upon by your petitioner, that he should have the privilege of redeeming the said 225 bales of cotton so surrendered by petitioner to said defendants and their confederates, and have permit to export the same by payment of such sum of money as defendants and their confederates might demand therefor; and thereupon petitioner delivered and paid to said defendants and their confederates the sum of $13,357$\frac{60}{100}$ in specie, and in goods, wares and merchandise at specie values, in redemption of said 225 bales of cotton and for permit to export and send said cotton beyond the limits of the State of Texas to the Republic of Mexico. And petitioner alleges and charges that the said sum of $13,357$\frac{60}{100}$ was an illegal, wrongful and oppressive exaction, and was submitted to by petitioner only because of the armed force to sup-

port and enforce the same. Wherefore he alleges damages $40,000, and sues therefor.

The defendants filed their demurrer, and also their pleas and answer as to the facts, in accordance with the requirement of the practice act of Texas, and with the established practice in Texas, both of the State and Federal courts.

Paschal's D., Art. 1441.

Considerable testimony was taken, which appears in the transcript, showing the character of the transaction and the character of the plaintiff, but upon the coming on of the case before Woods, Circuit Judge, and Morrill, District Judge, the demurrer to the petition was sustained, and the plaintiff declining to amend, the cause was dismissed.

The grounds of demurrer were to the cause of action—

1st. The petition does not set forth or show any legal or sufficient ground or cause of action.

2d. Petition shows that plaintiff in the matter for which he sues, was endeavoring to act, and did act, in violation of the laws and public policy of the United States, and is not entitled to maintain any action growing out of the facts stated in the petition.

3d. Petition shows plaintiff to have been an enemy of the United States, engaged in giving aid and assistance to the enemies thereof and to the military authorities of the so-called Confederate States, and is not entitled to any action.

To the form of the petition, that it

Does not set forth any cause of action with suf-

ficient certainty, but makes allegations against the defendants therein named and their confederates, which are general, vague and indefinite, and without specification of facts sufficient to inform defendant of the acts or wrongs for which he is sued.

ARGUMENT.

The analysis of the plaintiff's case is, that he was a "trader" in Texas during the war, and in July, 1864, had 450 bales of cotton, which he wished to get into Mexico "because of the risk incurred of its destruction, or other loss, during the internecine difficulties" between the United States and the Confederate States, and also had "goods, wares and merchandise." That the defendant, Hutchins, claiming to be a Confederate Lieutenant-Colonel, and to be Chief of the Cotton Office at Houston, combining with defendant, Wells, and with many other Confederates, had for a long time previously, by public notice, prohibited the exportation of cotton out of the State, except upon the terms of selling to the cotton office, for the use of the government of the Confederate States, either an equal amount to that to be exported at a nominal and arbitrary price, and for which the trader received a permit to make the exportation to Mexico of an equal amount of cotton to that thus sold to the said office for the use of the Confederate States. This "public notice," long previously given by the Houston Cotton Office, (one of numerous such offices in Texas and the Con-

federate States,) is the sole act charged against the defendants.

True, he alleges his knowledge, if he attempted to carry out his cotton, that "the armed force of the insurgents" was at hand to carry out the illegal exactions of defendants and their confederates, and would seize, capture and confiscate his cotton, and he would lose *the whole* of it; but this knowledge by plaintiff of what would transpire applied to "the armed force of the insurgents"—that is the Confederate army—and to the acts to be committed by it. There is no averment, there is no pretense, that either of the defendants did or attempted to make any seizure of his cotton, or was an impressing or other officer, claiming or pretending to exercise any power for the seizure of cotton, or had anything to do with the command or operations of the "armed force of the insurgents," or with putting them in motion against his cotton.

This armed force was ready and at hand to enforce the authority the Confederate government was claiming—its revenues from customs, taxes and levies of every kind—but there is no allegation, and it would be absurd if there were, that the "armed force" was under the orders of the cotton office.

The plaintiff himself applied to this cotton office. There is no averment of any application to the plaintiff by the defendants, or any of the agents of

the cotton office; and the exact negotiation, as alleged in the pleadings, was that the plaintiff proposed, for permits to export to Mexico 225 bales of cotton, to sell to the cotton office 225 bales at the price given by it, provided the cotton office would let him "redeem" the cotton, that is, purchase it back with, or exchange for it, specie and goods, wares and merchandise at specie prices, to the amount of thirteen thousand and odd dollars.

Or, to analyze the case a little further, and resolve it into its exact elements, it is that of a "trader," who, knowing the orders of the Confederate authorities and of the presence in Texas of the Confederate army, made a voluntary application to the cotton office, and obtained from them in time of war, exceptional and favorable conditions dictated by himself, by which he turned over to them, for the benefit of the Confederate States, specie and goods, wares and merchandise at specie prices, and obtained the authority and aid of the Confederate government to export his cotton out of the country, so as to free it from all the contingencies of the "internecine difficulties," and thereby plainly imparting to it a value double, or nearly double, its value without such permits and aid from the Confederate authorities.

The action, now, is to recover the value of this specie, goods, wares and merchandise which he delivered

to the cotton office, which he shows plainly it was not in accordance with their public notice or usual course of business to receive, and which they did receive only as a "condition insisted upon" by plaintiff.

To state this case must be to reach its decision.

The plaintiff, a "trader" in Texas during the war, is regarded as an enemy to the United States without respect to his original citizenship.

Prize Cases, 2 Black., 666, 687–8; Venice, 2 Wal., 258; Mrs. Alexander's Cotton, same 404; The Peterhoff, 5 Wal., 06.

The plaintiff was a "dealer" in Texas in cotton, the characteristics of which are thus stated by this court:

"That cotton, though private property, was a legitimate "subject of capture, is no longer an open question in this "court. (U. S. v. Anderson, 2 Wal., 404; U. S. v. Padel- "ford, 9 Wal., 540; Haycraft v. U. S., 22 Wal., 81.) It "was the foundation on which the hopes of the rebellion "were built. It was substantially the only means which "the insurgents had of securing influence abroad. In the "hands of private owners it was subject to forced contribu- "tions in aid of the common cause. Its exportation "through the blockade was a public necessity. Importing "and exporting companies were formed for that purpose. "It is not too much to say that the life of the Confederacy "depended as much upon its cotton as it did upon its men. "If they had had no cotton, they could not have had after "the first year or two the means to support the war. To a "very large extent it furnished the munitions of war and "kept the forces in the field. It was, therefore, hostile

"property and legitimately the subject of capture in the "territory of the enemy." Lamar, executor, v. Browne, 92 U. S. S. C., 194.

"It is a fact so well known as to need no finding of the court to establish it, a fact which like many other historical facts all courts take notice of, that cotton was the principal support of the rebellion, so far as pecuniary aid was necessary to its support." Sprott v. U. S., 20 Wal., 462.

And see Hayeraft v. U. S., 22 Wal., 94.

The plaintiff was also a "tra ler" in "goods, wares and merchandise" suitable to the wants of the military authorities of the Confederate States, of a character which, though not alleged in the petition, the cotton office was willing to take at "specie prices" in preference to the vital article of cotton. The plaintiff furnished them that which it was their purpose to procure with the cotton.

This court has time and again given with vivid pen the features of that period. It will affect no ignorance of them as applied to this case. In the language of this court, after the first year or two of the war, cotton was the only means to support the war—the "life of the Confederacy" as much as its men. Plaintiff's petition draws the picture: "Public notice" for "*a long time* previously thereto," backed by "the armed force of the insurgents," affecting the entire cotton, every bale of it in the State, and subjecting it to the control of the Confederate power. In this condition of affairs, in July, 1864, cotton for more than two years the sole

resource of the Confederacy, plaintiff becomes the owner and possessor of 450 bales at the city of Houston, the military headquarters of the State, as well as the place of the cotton office.

He sought the cotton office; it did not seek him. He states precisely "the compulsion and coercion" under which he acted, namely his "knowledge of the armed force of the insurgents at hand," and the "circumstances" existing around him. With no demand upon him for specie, or "goods, wares and merchandise" at specie prices, with no soldier to coerce a single dollar or article, it was his own voluntary expedient to procure the cotton office to accept from him his specie and "goods, wares and merchandise." He received the usual price for the cotton; what it was he does not state, but calls it "nominal and arbitrary," and then dictates his own exchange of his supplies delivered to the office for the benefit of the government of the Confederate States for the cotton.

A stronger example for the application of the maxim "*Ex turpi causa non oritur actio*" can not well be conceived.

The plaintiff claims that he should not be affected by that rule, because he acted under the compulsion and coercion of his knowledge of the existence of an armed force which would seize his cotton if he did not comply with the demands of the cotton

office; that he is not *in pari delicto*, and that it is consistent with public policy that he should recover from the defendants on account of the oppresion and wrong practiced upon him, and of his enforced acquiescence. This is no case in which the law will undertake the admeasurement of guilt between these parties. The offense which the plaintiff alleges he committed against the United States was to supply specie and goods, wares and merchandise at specie prices, to the defendant Col. W. J. Hutchins of the Confederate army, his co-defendant Wells and their confederates, representing the Confederate Cotton Office, for the benefit of the Confederate government. He gave aid and comfort to the public enemies of the United States. He brought himself within the precise definition of treason against the United States. His excuse for it is that he wanted to get back his 225 bales of cotton and export them to Mexico. This is no justfication for aiding a public enemy.

"The reason," says Wilmot, C. J., 2 Wilson, 347, for refusing to entertain actions founded on violations of law, "is for the public good. You shall not stipulate for iniquity. No polluted hand shall touch the pure fountain of justice."

Said Lord Mansfield, Cowper 341: "It is founded on general principles of public policy: * * not

for the sake of the defendant, but because the court will not lend their aid to such a plaintiff."

By what scales will this court weigh the treason committed by the "trader' in cotton, 'the very life of the Confederacy'—its sinews in war," and in specie, goods, wares and merchandise, to the cotton office, for the benefit of the government of the Confederate States, at military headquarters in Texas, in July, 1864, with the treason committed by the officials who were connected with that office? I think the court will not attempt it; but if so, whether such comparison be made amid the passions of war, or by the calmest judgment of peace; by the statesman, the moralist, or the jurist; in whatever forum or time; there can be no public policy, no ethics, no law, that would permit the alien trader to traverse an insurgent country in civil war, deal with the rebel people, and the rebel officials in cotton, which was the life of the struggle, furnish money supplies for the government to its military officials, and then say, in the courts of the government thus offended, that these officials were guiltier than he. On the contrary, his action was voluntary. Theirs compelled. He sought them. They only accepted his propositions. He was in pursuit of gain. They (however misjudged) acted to perform supposed duty. If that rebel host must be scanned and classified and variously sentenced, the judgment of en-

lightened law will confirm now that which, upon the first, almost divinely pronounced

"Mammon, the least erected Spirit that fell."

In Hanauer v. Doane, 12 Wal., 342, Mr. Justice Bradley delivering the opinion of this court, says:

With whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum*, or of inferior criminality, he can not do it without turpitude when he knows or has every reason to believe that such money or goods are to be used for the perpetration of a heinous crime and that they were procured for the purpose. * * * No crime is greater than treason. He who being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof. He voluntarily aids the treason. He can not be permitted to stand on the nice metaphysical distinction, that although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his act were too serious and enormous to admit such a plea. He must be taken to intend the consequences of his own voluntary act." 346, 7.

The subject is still more directly considered by the interest. It was his duty to speak then, and his same Judge in the succeeding case, Thomas v. City Richmond, 12 Wal., 349. He says:

Lord Mansfield, in Smith v. Bromley, as long ago as 1760, laid down the doctrine, which has ever since been followed, in these words: "If the act be in itself immoral or a violation of the general laws of public policy both parties are in *pari delicto*, but where the law violated is calculated for the protection of the subject against oppression, extortion or de-

ceit, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover."

After discussing the cases applicable to the latter part of the above principle—

"But if the parties are in *pari delicto*, or if the consideration as well as the bills or other obligation is tainted with illegality or immorality, as it would be if loaned or advanced for the purpose of aiding in an illegal or immoral transaction, or if the receiving as well as passing or issuing the bills is forbidden by law, then the holder is without legal remedy and the parties are left to themselves. * * * We have already decided in Texas v. White, 7 Wal., 700, and just now in Hanauer v. Doane, that a contract made in aid of the rebellion is void and can not be enforced in the courts of this country."

See Texas v. White, 7 Wallace, on page 734.

The same principle is very clearly stated in Lowell v. Boston & Lowell R. Co., 23 Pick., 32:

"In respect to offenses in which is involved any moral delinquency or turpitude all parties are deemed equally guilty, *and courts will not inquire into their relative guilt.* But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong doers."

It does not consist with the dignity, the rights or the public policy of the government, that its courts, much less its juries, should be permitted to enter into computations of the amount of pecuniary consideration—loss or gain—which will justify a proposal to aid, and the giving of aid and comfort to

its enemies. The plaintiff had saved 225 bales, with its value doubled or nearly so in Houston that day —as the court is bound to understand of the difference in value between *permitted* and *unpermitted* cotton—by the permits given to him by the cotton office. He had gotten the price paid by the cotton office for the other 225 bales, of which he tells nothing except that it was "nominal and arbitrary." He proposed and was permitted to exchange specie, goods, wares and merchandise to the cotton office for the Confederate Government, for this latter 225 bales. Was this motive enough—coercion, compulsion enough—to operate on the will of this plaintiff and condone the offense? Suppose, your Honors, it had only been 200 bales, or 100, or 50, or a single bale, that the cotton office had "oppressed" him for! How much must be the pressure? Suppose he had 5000 bales of cotton already secure and safe in Mexico; or that this goods, wares and merchandise was part of a vast stock; how would that affect the question of his power or duty to yield to the pressure? There is no horizontal scale and no sliding scale. The inquiry is demoralizing and absurd.

Bishop, in his chapter on "Necessity and Compulsion," 1 Crim. Law, (6th ed.) §347, says:

"An apprehension, however well grounded, of having property wasted or destroyed; or of suffering any other mischief not endangering the person; or even, it has been

said, apprehension of personal injury less than will deprive of life, is not a justification of a traitorous act." 1 East. P. C., 71; 2 Dall., 86.

"The greater the crime the greater must be the necessity to excuse it." *Ib.* §353.

Whitis v. Polk, 36 Tex., 602, was a suit for an account of cotton purchased under contract between the parties in Texas and exported into Mexico in 1864. The court held that it was a contract for an illegal object, in violation of the public policy of the United States, and could not be enforced. The court say:

"The public policy of the United States during the war "was to stop all commerce or trade by the rebel States or the "citizens thereof with the outside world; to prevent all in- "tercourse whatever—even with neutral governments—that "all aid or comfort might be cut off, to the end that the rebel "power might the sooner be put down and the citizens "forced to their rightful allegiance. This was a policy the "Government had a right to inaugurate and to put in force "to any extent. The contract sued on was in direct con- "flict with this policy."

The court further say:

"The appellee in this case, knowing that the only resource "for the Confederate army, in obtaining clothing and sup- "plies, consisted in the cotton of the country, and knowing "also that very rigid exactions were laid upon all cotton in "the State by the Confederate authorities, even to one-half "of the entire crop; and knowing also that no cotton could "be got out of the country without satisfying those exac- "tions in one way or the other, voluntarily purchased "Bowles' cotton for the purpose of sending the same out of "the country to market, and then made a bargain with the

"appellant to pay the Confederate exactions and procure "what were known as permits for sending the same beyond "the Confederate lines, and at the same time knowing that "the whole transaction was in direct violation of the laws "and public policy of the United States, can hardly plead "innocence or an exemption from the legitimate conse- "quences of his own acts."

This is the latest decision by the Supreme Court of Texas on the subject involved. The courts of that State, with knowledge of the public history, of the common condition of affairs, declare that an undertaking to obtain cotton and carry the same to Mexico in 1864, was, essentially, to undertake to give aid to the rebellion and to violate the public policy of the United States.

Every man must be held chargeable with the preunderstood, certain, and unavoidable consequences of his acts. The assumption of control over the cotton of the country and of its exportation by the Confederate authorities, and the requirement on certain terms of one-half of all cotton permitted to be exported are shown to have been the condition in Texas by the Supreme Court of that State; and are alleged by the plaintiff, in his petition, to have existed for a long time previously to July 1864. Cognizance of very similar conditions throughout the Confederate States has been assumed by this court in all its decisions. When, then, in July, 1864, this foreign "trader" in the country became possessed, at mili-

This decision was recognized and affirmed at the last term of the Supreme Court of Texas. (Alexander v. Lewis, 46 Texas R.)

tary headquarters in Texas, of 450 bales of cotton to export to Mexico, what knowledge, intention and responsibility will the court impute to him? Could he claim to be an exception to the universal rule? Did he expect to buy cotton (at prices of course regulated by the existing state of affairs) and export it to Mexico without dealing with the Confederate authorities exactly as he did do, except that he proposed and obtained special terms of favor?

Says the Ch. J., "The Essex went to New Orleans "for gain, and voluntarily assumed all the chances of "the war into whose presence she came." (U. S. v. Dickelman, 92 U. S., 526.)

The question is not whether the Confederate authorities, by the laws of Texas, the laws of the Confederacy, or the laws of the United States, had any just right to assume authority over the entire cotton crop of the country; not one between him and the Confederate officials whether they exercised lawful or usurped authority, or practiced acts of exaction and oppression toward him. But what was *his status* in these transactions, as respects the government of the United States and the war it was then waging?

To this there can be but one reasonable or just answer, and that is, when he was found possessed of cotton in Texas in July, 1864, dealing with the cotton office, initiating those dealings, not pursued by

its agents, but going to it for terms, going to and furnishing it specie money and supplies suitable for the government of the Confederate States, making no protest, uttering no complaint, giving no notice of reclamation, he must be held to have premeditated and intended those dealings, or to have entered into them with no excuse which can receive a hearing before a court.

The plaintiff had full opportunity, under the pressure of the demurrer and the opinion of the judges in the court below, to state all exceptional facts which could give special or favorable complexion to his rights, and exclude him from the presumptions attaching to such dealings. He stated none. The case is believed to be without merits, legal or otherwise.

U. S. v. Huckabee, 16 Wal., 414, is a far stronger case of constraint and coercion. The syllabus is as follows:

"Where the agents of the Confederacy came to persons owning iron works and informed them that they must either contract to furnish iron at a uniform price, or lease or sell the works to the Confederacy, or that they would be imprisoned, and the owners then much in debt; after consultation—the works being already in charge of a guard from the Confederacy, which possessed despotic power over skilfull laborers—considering that to 'contract' would cause a failure of their scheme, and to lease would be ruinous, resolved to sell, held that such a sale was not made under duress."

And see U. S. v. Keehler, 9 Wal., 83; Sprott v. U. S., 20 Wal., 459; Whitfield v. U. S., 92 U. S., 165.

Second. The lack of certainty, the generality, vagueness and indefiniteness of the statement of the cause of action in the petition are assigned as grounds of demurrer.

Throughout, the charges are against the "defendants and their confe[illegible]tes," without discrimination, and without laying any proper predicate for the alleged confederates.

He alleges the issuance to him of permits to export 225 bales of cotton. The court plainly perceives that this added greatly to the actual cash value of the cotton at Houston; that "permitted" cotton must have had double or nearly double the value of cotton without "permits." Then the petitioner states that he sold the other 225 bales to the cotton office at a price. He calls it a "nominal and arbitrary price;" but this is no sufficient statement when demurred to. So he sues for the value of specie, goods and merchandise at specie prices to the amount of $13,357 60.

The "petition," which is the form of suit in Texas, both in the Federal and State courts, is required by statute "to set forth a full and clear statement of the cause of action." (Paschal's D., Art. 1427.)

Party must state the actual and peculiar circumstances of his case. (7 Tex., 473.)

Contract must be fully, correctly and distinctly described. (14 Tex., 418.)

The demurrer on this ground was well taken.

The motive of the plaintiff not to set out his account of "goods, wares and merchandise" sold by him to the cotton office as an express condition of the transaction, is very obvious. And it is equally obvious that it was the right of defendants to demand, as proper information of the facts of the plaintiff's case, and of his claim to relief, that a statement of the particular "goods, wares and merchandise" which he traded to the Confederate military authorities should be set forth, and that the cause of action should not be alleged in this general and vague manner.

W. P. BALLINGER,

For Defendants in Error.